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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-896

WORTHEN BANK & TRUST COMPANY, N. A.,
Petitioner,

v.

NATIONAL BANKAMERICARD INCORPORATED,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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FIDELITY PRINTING COMPANY, HOUSTON

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In view of the cogent arguments presented by the State of Arkansas as amicus curiae in support of Worthen's petition for certiorari and in response to the arguments contained in NBI's Brief in Opposition, it is unnecessary for Worthen to make other than a brief reply to NBI's arguments in opposition:

1. NBI attempts to sustain the decision below on a ground not relied upon or mentioned by the court below.[1] NBI erroneously suggests that the court below reversed the trial court's granting of summary judgment to Worthen

[1] The tenuous nature of NBI's attempt to support the decision below is characterized by its failure to cite *White Motor*, upon which the lower court so heavily relied, and by its reliance on dicta in a district court opinion (*United States* v. *Morgan*) which was ignored by the court below and which has never been cited with approval by this Court.

"on the basis of facts which were in conflict in the district court." Brief in Opposition, p. 10. The conflict, according to NBI, is whether "NBI is a combination of competitors rather than a unitary enterprise." *Id.* at 11. If there is no group, it follows, according to NBI, that there can be no group boycott. Worthen respectfully suggests that one may search in vain the opinion of the lower court for any reference to conflicting facts as to the nature of NBI and particularly as to any doubt by the lower court that NBI is a combination of separate competing entities. While the court below stated that it lacked information as to "exactly how NBI competes with MC on a system level or how the individual member banks compete with each other" (A-20), at no point in its opinion did the court of appeals point to any conflicting facts as to the nature of NBI as a combination of separate entities competing with each other. Indeed, as viewed by both the lower court and the Department of Justice in its amicus brief, the issue presented by the appeal was "whether it is illegal *per se* for *a group of banks* which are *combined* in a system to produce a product (or service) that individually none of them is able to produce, *but which they sell in competition with each other,* to exclude from proprietary membership in *their group* a bank which is participating in another such system." (A-13) (Emphasis added) The lower court had no difficulty whatsoever in describing the nature of NBI (A-3) or the mechanics of the BankAmericard system (A-4). Implicit in the lower court's recurrent emphasis that NBI members do not engage in price fixing or territorial allocation is the recognition that NBI is clearly a combination of competing business entities. For if that were not the case, there would be nothing unlawful if its members fixed prices or allocated territories. Worthen does not for a moment question that "the very nature of the nationwide bank card service *requires* that banks, otherwise competing, engage in joint activities in respect of the bank card service in order to

make that service available at all." Brief in Opposition, p. 9. Worthen also agrees that "collective activity *necessary* for the production of a service has long been recognized as permissible under the antitrust laws." *Ibid.* But these broad statements beg the question presented here. The question presented here is not whether competing banks may engage in any joint or collective activities, but rather what kinds of joint and collective activities they may engage in. The *per se* rules are commands that certain kinds of joint and collective activities cannot be engaged in and that those who engage in them will not be given the opportunity to prove that they are "required" or "necessary." This Court has clearly established that group boycotts and customer restrictions are among such prohibited activities and are to receive no different treatment than price fixing or territorial allocations.[2] NBI is no more a "unitary enterprise jointly producing a single product" than was the Associated Press and yet this Court never for a moment suggested that the latter should have been given an opportunity to prove its restrictive bylaws were "necessary" for the production of a national news service.

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[2] NBI persists in ignoring the fact that its bylaw does not prohibit dual agent-merchant ("B") banks but does prohibit card-issuing ("A") members of NBI from being agent-merchant ("B") banks in Interbank and "B" members of NBI from being "A" members of Interbank. Thus, NBI avoids responding to Worthen's customer restriction argument and is also able to assert that the bylaw "rather than being a 'group boycott,' simply enforces fiduciary obligations" of joint venturers. Brief in Opposition, p. 10. If that were the purpose of the bylaw 2.16 (as opposed to bylaw 2.15 which, as set out at A-8 n. 4, expressly deals with the issue of confidentiality and which was not challenged by Worthen) and if a "B" member of NBI were a joint venturer, then why does the bylaw permit a "B" member of NBI to be a "B" member of Interbank. If a "B" member is not a joint venturer, then why does the bylaw prohibit a "B" member of NBI from being an "A" member of Interbank. Furthermore, merely because a collective refusal-to-deal has a beneficial effect (*i.e.*, the prevention of information piracy as asserted here or style piracy as asserted in *Fashion Originators*), does not transform it into something other than a "group boycott."

2. The lower court's misapprehension of the nature of the *per se* rules is clearly illustrated by NBI's characterization of what it held:

> "What must be tried under the decision of the court below is whether, once all the facts have been disclosed, a 'group boycott' exists." Brief in Opposition, p. 11.
>
> "There is no basis for applying a rule of law until the facts are determined." *Id.* at 12.
>
> "No argument of law can be in point until the facts are settled at trial." *Id.* at 14.

If by these statements NBI means that a rule of *per se* illegality may not be applied prior to a factual determination that the defendants engaged in certain kinds of proscribed conduct, such statements are correct but irrelevant in the context of this lawsuit. There is no dispute that NBI enacted bylaw 2.16 or as to what the bylaw means and how it operates. If, on the other hand, NBI means that the *per se* rule cannot be applied until "all the facts have been disclosed" at a full trial on the merits, such statements cannot be squared with the prior decisions of this Court explaining that the function of *per se* rules is to avoid such complete factual inquiries and that when *per se* conduct is established, summary judgment is appropriate. There is no factual dispute as to the kind of conduct NBI has engaged in; the only factual dispute is as to the reasonableness of or necessity for its conduct, and that is a dispute which need not be resolved since bylaw 2.16 constitutes a group boycott.

3. NBI launches a frontal attack on *Topco* by arguing, as did Topco Associates, that the application of the *per se* rule here would "reduce competition by eliminating intersystem competition." Brief in Opposition, p. 13. This Court in *Topco* certainly recognized that its decision preserving intrabrand competition might reduce or eliminate inter-

brand competition, yet this Court said it is not for private groups of businessmen to decide which level of competition is most important. If NBI believes that its prohibition of dual membership implements antitrust policy (be it the policy against interlocking directorates or anticompetitive mergers), it can sue Worthen for violations of existing statutes or seek new economic legislation from Congress. *Topco* prohibits it from usurping, by self-regulation, the role of the courts or Congress.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned, a member of the Bar of this Court, hereby certifies that three copies of the foregoing Reply to Brief in Opposition have this the ..... day of January, 1974, been served upon each counsel of record for respondent in accordance with Rule 33 of this Court, by depositing the same in the United States Mail with first-class postage prepaid, addressed to said counsel at their post office addresses.

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Stephen D. Susman